NO. 49474-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CLEON O. MOEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael H. Evans, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Cleon Moen is 75 years old. He was a respected member of the community with no criminal record. Then things began to change. Friends and family noticed odd behavior. He grew paranoid and depressed. His marriage of thirty years fell apart. He was arrested for fourth degree assault. He attempted suicide. Then he killed his wife with an ax, a hair dryer cord, and a red wire.

Experts at trial diagnosed him variously with severe depression, adjustment disorder, and frontal temporal dementia. He was convicted of first degree murder, by a jury that included one member with outside knowledge of his mental health. The court refused to consider evidence of his age-related mental infirmities before imposing what it believed was a mandatory sentence: life in prison without parole.

This case presents two issues: whether the juror should have been excused, and whether constitutional prohibitions against cruel punishment permit a court to impose a life sentence without parole on an elderly offender with age-related mental infirmities.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying defendant Cleon Moen's motion to excuse juror number 4 for cause.

2. The sentencing court erred in concluding that constitutional prohibitions on cruel punishment do not apply to an elderly person with mental infirmities.

3. The sentencing court erred in declining to consider mitigating circumstances related to Moen's mental infirmities before sentencing him to life in prison without the possibility of release.

Issues Pertaining to Assignments of Error.

1. After trial testimony began, juror number 4 notified the court she had previously met Moen's family to discuss providing Moen assisted living services, and may also have obtained medical information from a hospital regarding Moen's self-inflicted gunshot wound. By denying Moen's motion to exclude juror number 4, did the trial court violate his right to a fair trial by an impartial jury under the Sixth Amendment and Article I, section 22?

2. Evidence at trial from both parties supported that Moen was elderly and had age-related mental infirmities, though the precise diagnosis differed between experts. The sentencing court refused to consider mitigating evidence of his age-related mental infirmities before sentencing

Moen to life in prison without the possibility of release. Did the sentencing court violate prohibitions on "cruel" punishment under the Eighth Amendment and Article I, section 14?

B. STATEMENT OF THE CASE

The Cowlitz County Prosecutor's Office charged Cleon Moen with one count of aggravated first degree murder – DV, of his wife Michelle Moen.[1] CP 46; RP 192.

1. Undisputed Facts

Undisputed evidence established the following. Moen was born in 1942 and had lived a crime-free life for over 70 years. RP 1547; CP 117. He and his wife Michelle had been happily married for 30 years. RP 804, 1236. Moen was a respected member of the community, a veteran, father, grandfather, and great-grandfather, and volunteer with the local Boy Scouts, veteran's group, and wild horses association. RP 803-05, 1135. After his son died of brain cancer, Moen began to exhibit personality and behavioral changes. RP 1142, 1180-82, 1336. Moen was treated for depression. RP 813. His wife suspected him of having an affair. RP 583-84, 815. Moen believed Michelle was suffering from mental illness. RP 814-15. They began to have marriage problems. RP 351.

[1] Because the parties share a last name, this brief refers to Cleon Moen as "Moen" and Michelle Moen as "Michelle."

In June 2014, police were called to the Moen residence to investigate a report of domestic violence. RP 266-67. Moen was arrested and charged with assault 4 – DV. RP 269; Exh. 213. Michelle testified against him at trial. RP 270, 279. The trial resulted in a hung jury. RP 279. Immediately after the trial, Moen shot himself in the face with a shotgun in the court parking lot. RP 284-87. A suicide note to his family was later discovered, in which he pleaded with them to get help for Michelle. RP 718-20, 812, 830. He was hospitalized and suffered substantial disfigurement. RP 1194-95.

Computerized Axial Tomography ("CAT" or "CT") scans of his brain were taken which showed no obvious brain injury from the gunshot wound, but did show general brain atrophy within normal parameters for his age, as well as more significant brain atrophy in the frontal lobes. RP 1191-92, 1194, 1200-01.

Divorce proceedings were initiated. RP 298-99. Occupancy of the family residence was awarded to Michelle and Moen moved out. Exh. 202; RP 291-92, 783-84, 1372. Michelle served Moen with a notice to attend a hearing to show cause, alleging he had violated the temporary order awarding property and maintenance costs. Exhs. 220, 222; RP 292-96.

Moen then covertly entered the barn on Michelle's property, but left when he realized Michelle would not enter the barn during that time of year.

RP 1261. On September 5, Moen again covertly entered the property, spent the night in his mother's trailer, and entered the residence the next morning when Michelle was out. RP 554-56, 932. He waited for her to return, assaulted her with an ax and his fists, and then strangled her with a hair dryer cord and wire, resulting in her death. RP 554-56, 662-63, 904. He then attempted suicide by asphyxiation in a pumphouse behind the residence, but was arrested and hospitalized. RP 78, 556.

In a recorded statement, Moen told police, "[I]t's all premeditated, I planned the whole fucking thing." RP 932.

2. Disputed Evidence of Mental Infirmity

The primary issue in dispute was Moen's mental state at the time of the crime. The defense argued for diminished capacity on the basis of a dementia diagnosis. RP 1515. The State argued Moen was capable of intent and premeditation. RP 1523-24, 1533-34.

Defense expert Dr. Hasan Ozgur, a medical physician who specialized in radiology, testified that he observed frontal lobe atrophy in the CAT scans of Moen's brain, and this was an indicator of dementia. RP 1195-96. However, he stated that as a radiologist, he was not qualified to diagnose Moen with dementia, particularly without more information regarding Moen's behavior. RP 1200-01.

Defense expert Dr. Robert Stanulis, a psychologist specializing in gerontology, diagnosed Moen with frontal temporal dementia. RP 800, 810, 812. He explained frontal temporal dementia affects the frontal lobes, and symptoms involve personality changes, a lack of empathy, and less obvious short-term memory and learning problems. RP 818. Dr. Stanulus testified that Moen was perseverating or obsessing over the idea that he had to harm his wife in order to get her taken to the hospital to obtain treatment for her mental illness, and that this was an example of the "disordered thinking" typical of a diagnosis of frontal temporal dementia. RP 822-24, 827.

The CAT scan showing frontal lobe atrophy, Moen's family members' observations regarding changes in behavior, and Michelle's accusations of an affair all supported the diagnosis. RP 806-07, 810. Dr. Stanulis testified that in his opinion, Moen's mental illness was the source of his diminished capacity, and also Moen objectively did not have a premeditated intent to kill Michelle, only a delusional intent to harm her in order to help her. RP 831-32. Dr. Stanulis believed Moen told police the killing was premeditated because it furthered his original plan of suicide; where he had been interrupted by police, he hoped to ultimately commit suicide at the hands of the State via the death penalty. RP 828; also RP 102.

Moen's daughter, Michelle Moen, testified that in 2014, she believed her father was having a "complete psychotic break" after his

release from the hospital for self-inflicted gunshot wounds. RP 1176. She noted other behaviors that were out of character, including Moen's requests for gambling money. RP 1182. Neighbors and friends similarly testified they were shocked to learn of Moen's suicide attempt outside the courthouse, because it was totally out of character. E.g. RP 1081, 1100.

The State offered the testimony of Dr. Ray Hendrickson, a forensic psychologist at Western State Hospital, as a rebuttal witness. RP 1277-1364. Dr. Hendrickson stated in his report there was "ample information" to suggest Moen was suffering at the time of the offense from "symptoms of depressive disorder or mood dysregulation and possible symptoms of a neurocognitive disorder." RP 1340. He conducted a diminished capacity evaluation of Moen and ultimately diagnosed him with "adjustment disorder" and made a "historic diagnosis of major depressive disorder" that was in remission at the time of the evaluation. RP 1295-96.

Dr. Hendrickson testified Moen displayed no indication of dementia, which he initially defined as "overall memory difficulty." RP 1297. However, Dr. Hendrickson later agreed that the medical community recognized several types of dementia with a wide variety of symptoms, including neurocognitive impairment, interference with the organization of thoughts and thought processes, difficulty with language (i.e. "aphasia"), poor judgment, underestimation of risks, aggression and frustration,

suicidal tendencies, lack of inhibition leading to inappropriate comments and behaviors, delusions involving themes of persecution, and personality changes, among others. RP 1348-55. He also agreed that while dementia is progressive overall, individuals with dementia often will move in and out of lucidity and coherence. RP 1357. Dr. Hendrickson also agreed that dementia is most often, though not exclusively, associated with the elderly. RP 1354. Finally, he agreed that even professionals have difficulty differentiating between individuals with major depressive disorder and those with dementia, particularly as the two often occur together. RP 1355.

Dr. Hendrickson explained Moen "certainly wasn't saddened by ... how he described the event" but rather discussed it "matter-of-fact" except that he laughed at the police use of what he described as "this funny, little robot" that was sent into the pumphouse to look for him. RP 1308. Moen also varied his story only in minor details, including whether or not he acknowledged Michelle was deceased at the time he left for the pumphouse. RP 1309. Dr. Hendrickson testified that according to his notes, Moen's daughter, Shelly Moen, had told him Moen had been treated for depression, she had noticed changes in his behavior, and he was "saying weird ass shit," but that she worked with dementia patients as a nurse's assistant and did not believe Moen was demented. RP 1336-37. Shelly Moen testified she did not recall making any such statement to Dr. Hendrickson. RP 1185.

Ultimately, Dr. Hendrickson concluded that despite Moen's diagnoses, he retained the ability to intend, premeditate, and make adjustments to his plans, and so did not qualify for the diminished capacity defense under law. RP 1313-18, 1320-21.

3. Jury Selection

The court arranged to have two alternate jurors. RP 206. After *voir dire*, the jury was sworn and excused for the day. RP 221-22. The next morning before testimony began, two jurors were excused for cause.

Juror number 8 was excused after the court learned she had suffered an attack of claustrophobic anxiety in the jury deliberation room, and could not be rehabilitated because her medication specifically warned her not to make decisions while medicated. RP 247-53.

Juror number 3 was also excused after she advised the court she had learned emotional details of the case through her employee, who was engaged to Moen's grandson, and she believed this would prevent her from being unbiased. RP 247, 254-56, 259. Both the State and trial court expressed concerns over losing both alternates so early in the process. RP 259.

The State then made an opening statement and witness testimony commenced. RP 264-299. That same morning, after cross-examination of the fourth witness began, juror number 4 advised the court of a potential

issue. RP 300. The court advised the parties that juror number 4 had realized she had previously "been contacted by the Moen family" regarding provision of long-term care to Moen after his facial injury. RP 300. The court further advised the parties that she indicated Moen ultimately "did not go to their facility" and it was "just one ... phone call or one contact." RP 300-01. At that point, details of the contact were unclear. See RP 300-01. Due to the State's scheduling concerns, the court and parties agreed to address the issue after completing testimony scheduled for that morning. RP 301.

After morning testimony, the court and parties spoke with juror number 4. RP 316-19. The court clarified with juror number 4 that she owned an assisted living company and Moen's family had contacted her business regarding assisted living for Moen. RP 316-17.

> The following exchange then took place:
>
> JUROR: I don't recall if it was the family that first came to us or if we received paperwork from the hospital with medical information about the gunshot wound. I didn't realize that until it was mentioned this morning that there was a gunshot wound. And the family did come in shortly after that looking for placement. I only met family. We did not take him. We didn't feel that that was the right care for him.
>
> THE COURT: Okay. So the family that came in, do you remember who the family members were?
>
> JUROR: I don't, no.
>
> THE COURT: How many people, any idea?

JUROR: I want to say it was one, maybe two.

THE COURT: Maybe two people? And do you have an estimate about the time that you spent with them?

JUROR: Maybe a half-hour, if that.

THE COURT: Okay. And do you recall any information that they may have shared related to why the care needed to be or just any background information?

JUROR: The only thing that I recall is that the family was looking for placement because of the gunshot wound.

THE COURT: Okay. So as far as you know, you were made aware of the individual's name that was seeking long-term care?

JUROR: Correct.

THE COURT: Okay. And that you're aware that there was a gunshot wound and --

JUROR: Yes.

THE COURT: Okay. And anything from those interactions, whether the initial contact either was from the family or hospital I think you said, right?

JUROR: Right.

THE COURT: And then including that and also then the contact with the family members at the facility, did you gain information or learn any information about Mr. Moen, the circumstances of how the gunshot was inflicted or the circumstances surrounding it?

JUROR: Just that it happened outside the courthouse.

RP 317-18.

The court then invited the attorneys to question the juror, and the following exchange occurred:

[THE STATE]: ... is there anything about that that would cause you to be unable to decide this case based on the facts and evidence presented here in court?

JUROR: No.

....

[DEFENSE COUNSEL]: ... You recall that it was Moen family members, his family members, that wanted the long-term care?

JUROR: Assisted living, yeah, somebody came in --

[DEFENSE COUNSEL]: Assisted living. ... Because it was Mr. Moen's family members, I mean, would you feel now that you'd have to convict him because you'd have to bend over backwards to show neutrality?

JUROR: No.

[DEFENSE COUNSEL]: You can still keep an open mind on it?

JUROR: Yes.

RP 319.

Moen immediately moved to exclude juror number 4, arguing that she was biased and there was a strong risk that because she had met Moen's family members, she would "bend over backwards to convict" Moen in order to show her neutrality, and the late hour of her revelation had prevented Moen from intelligently exercising his peremptory challenges during *voir dire*. RP 320.

The trial court reasoned juror number 4 had "limited contact with family members," a limited memory of the contact, and did not "recall[] any substantive matters," other than Moen's name and that he had a gunshot wound that had occurred near the courthouse. RP 320-21. The court noted juror number 4 "indicated an ability to keep an open mind" and denied the motion to excuse her. RP 321.

4. Closing Argument & Verdict

In closing, the defense argued for a diminished capacity defense, that Moen's condition had interfered with his ability to form intent or premeditated intent. RP 1513-14. The defense also argued Moen did not intend to kill Michelle, only to harm her as a result of his delusional belief that Michelle, not he, suffered from mental illness, and the only way to get her help was to injure her enough that she would need to be treated at a hospital. RP 1508-09.

The State countered that the jury need not decide whether Moen had a mental illness. RP 1484. Where Moen was of sufficiently sound mind to understand, intend and premeditate the killing, a diminished capacity defense should be rejected, despite any mental health diagnoses. RP 1523-24, 1533-34.

The jury rejected Moen's diminished capacity defense and found him guilty of aggravated first degree murder-DV. RP 1536-37; CP 103-06.

5. Sentencing Hearing

At sentencing, the State argued that because it was not seeking the death penalty, the statute required a sentence of life in prison without the possibility of release. RP 1568-69 (citing RCW 10.95.030(1)). The defense agreed that the statute mandated life in prison without consideration of mitigating factors, but argued the statute as applied to Moen violated

prohibitions on cruel punishment. RP 1581. Just as Washington jurisprudence required consideration of mitigating factors before sentencing a juvenile or person with intellectual disabilities to life in prison or death, constitutional protections required similar treatment of an elderly person with mental infirmities. RP 1581.

Several witnesses spoke on behalf of Michelle Moen. RP 1547-67. Moen allocuted in a rambling fashion, describing intimate details of his thirty year marriage to Michelle, but did emphasize that he did not plan the killing. RP 1584-99.

The sentencing court noted it did not hear an apology or "any ounce of remorse" from Moen. RP 1600. Moen inappropriately interrupted the judge, saying, "I totally loved her." RP 1600. The court disagreed stating, "That is not true." RP 1603.

The court noted that evidence of mental issues had been presented, but found "there is no ambiguity in the law." RP 1603. The Legislature had removed all discretion, and prohibited consideration of mitigating evidence in cases where the defendant did not have an intellectual disability (as defined per statute) and was not a juvenile. RP 1602-03. The court also concluded constitutional prohibitions on cruel punishment did not apply to cases with "a strong showing of premeditation and absolute lack of any

compassion," and so the court lacked authority to consider mitigation. RP 1603.

The court stated Moen "paused, he thought calmly, and he took action" and concluded by stating he was "heartless, cowardly, small and savage," and had "zero right" to any freedom, and so was sentenced to life in prison without the possibility of parole. RP 1603-04; CP 119. The sentencing court remarked to Moen, "you rightfully will die in prison, cold and alone." RP 1603-04.

C. ARGUMENT

1. MOEN WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

Both the federal and State constitutions guarantee the right to a fair and impartial jury. U.S. Const. Amend VI; Wash. Const. Art. I, §22; State v. Irby, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015), rev. denied, 184 Wn.2d 1036 (2016) (citing Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995)), rev. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).

Where a juror fails to disclose information during *voir dire*, the defendant is entitled to a new trial if the information is "material" and "would have provided the basis for a challenge for cause." State v. Cho, 108 Wn. App. 315, 321, 30 P.3d 496 (2001) (citing State v. Carlson, 61 Wn.

App. 865, 877, 812 P.2d 536 (1991), review denied, 120 Wn.2d 1022, 844 P.2d 1017 (1993); State v. Briggs, 55 Wn. App. 44, 52, 776 P.2d 1347 (1989)).

A potential juror must be excused for cause if his or her views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" State v. Gonzales, 111 Wn. App. 276, 277-78, 45 P.3d 205 (2002) (quoting State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986)), review denied, 148 Wn.2d 1012, 62 P.3d 890 (2003)). Whether the court should have removed a juror for cause is reviewed for abuse of discretion. State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001). If even one juror is biased or prejudiced, a defendant is denied his constitutional right to an impartial jury. Irby, 187 Wn. App. at 193 (citing In re Personal Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013)).

Washington defines two types of juror bias that require removal "for cause." RCW 4.44.170(1)-(2). A juror must be excused for "implied bias ... when the existence of the facts is ascertained, [that] in judgment of law disqualifies the juror" and this includes a juror's "affinity within the fourth degree to either party." RCW 4.44.170(1), .180(1). "[A]ctual bias" is defined as "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the

challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2).

Here, juror number 4 failed to disclose material information and exhibited both implied and actual bias when she admitted to at least one prior conversation about Moen and his need for assisted living with a member or members of Moen's family, who very likely could have included trial witnesses. RP 317-18. Moen moved to exclude juror number 4 for cause. RP 321. The trial court denied the motion. RP 321.

The State may argue juror number 4 was rehabilitated because she asserted she could keep an open mind and decide the case based on the evidence presented in court. RP 319. However, such reasoning is unpersuasive because the record indicates (i) the juror was minimizing her interactions, and there was a substantial risk (ii) she would recall more information as the trial proceeded, (iii) she would be unable to differentiate between information learned during or prior to trial, and (iv) the previously learned information was material to contested issues at trial.

Juror number 4's statements suggest she was minimizing the extent of her interactions. Initial information received by the court was that Moen's family members had contacted the juror's place of business, potentially over the phone or in person. RP 300-01. The information that made it to trial counsel emphasized that Moen ultimately was not accepted

as a client. RP 300-01. It was also unclear whether juror number 4 had had any direct contact with the family, or if they had merely contacted her business. RP 300-01.

When the court spoke to her in person, juror number 4 again minimized the interaction, stating, "I only met family. We did not take him." RP 317. It quickly became clear, however, there were two or even potentially three interactions, and possibly two sources of information, including referral paperwork from the hospital indicating Moen had a gunshot wound, an initial phone call by Moen's family members, and an in-person visit with Moen's family member at the facility. RP 317-18. These interactions were directly with the juror, not merely her facility, despite her repeated references to "we." RP 317-18.

When asked how many family members she interacted with, she responded, "I want to say it was one, or maybe two." RP 317. When asked how long they interacted, she responded, "Maybe a half-hour, if that." RP 317. Both of these statements also indicate attempts to minimize the extent of her contact.

According to her statements, the only details she recalled were (1) Moen's name, (2) that the family was seeking assisted living services for him, and (3) that he had a gunshot wound that had occurred outside the courthouse. RP 316-18. However, juror number 4 had been exposed to half

an hour of discussion with Moen's family member(s) and potentially additional referral paperwork from the hospital. RP 316-18. It is very likely that during that half hour (or more), she had learned much more information than the three brief details she claimed to recall at this early point in the trial.

The timing of her recollection is also relevant. She failed to recall any of this information until after hearing testimony from four witnesses. RP 300-01. The court and parties were aware there was a large amount of evidence still to be presented; ultimately the trial lasted seven days and included 30 State witnesses and 9 defense witnesses, including Moen himself, as well as dozens of exhibits. This shows there was substantial risk juror number 4 would recall additional details only after hearing additional evidence. This latent information, if later recalled, held additional potential to bias her decision-making.

The fact that she did not recall the source of the information regarding Moen's gunshot wound was also relevant. Juror number 4 stated she could not recall whether she had learned Moen had a gunshot wound from hospital records or from his family member(s). RP 317-18. Coupled with her inability to recall details until hearing them confirmed through trial testimony, this showed she would not be able to separate out information learned outside of the trial from evidence presented at trial. This created a

serious risk that her ideas, impressions, and ultimately her opinions would be tainted by outside information, even if she was not consciously aware of such influence.

Finally, the nature of the information she had been exposed to was material and highly relevant to disputed issues at trial. The defense theory of the case focused on Moen's frontal temporal dementia diagnosis. E.g. RP 1500-01. The defense argued Moen's condition had interfered with his ability to form intent or premeditated intent. RP 1513-14. He also held a delusional belief that Michelle, not himself, suffered from mental illness, and the only way to get her help was to injure her enough that she would need to be treated at a hospital. RP 1508-09. The State countered that Moen was of sufficiently sound mind to understand, intend and premeditate the killing. RP 1523-24, 1533-34. Both parties introduced mental health experts, and attacked the credibility of the other side's expert during closing. RP 1507-08, 1529.

In reaching their diagnoses and conclusions regarding Moen's capacity, both experts relied in part on information obtained from Moen's family members. The defense expert emphasized behavioral and personality changes noted by Moen's family supported a diagnosis of "frontal temporal dementia," and that the gunshot wound could have exacerbated or precipitated symptoms. RP 810, 821. The State's expert,

called as a rebuttal witness, testified there was generally no evidence of dementia, which he defined as "overall memory difficulty," and that Moen retained the ability to premeditate and intend. RP 1320. In reaching this conclusion, he stated that he had not followed up on an investigation of possible dementia in part because Moen's daughter and nursing assistant, Shelly Moen, had told him she worked with dementia patients and Moen did not have dementia. RP 1310. However, Shelly Moen, called as a defense witness, stated she believed Moen did have dementia, he was having a "complete psychotic break" after his release from the hospital, and she did not recall telling the State's doctor otherwise. RP 1176, 1185. This put the credibility of Shelly Moen at issue. Testimony from herself and others established that Shelly Moen was involved in coordinating Moen's care after he was released from the hospital, making it highly likely she was one of the relatives who spoke with juror number 4. RP 361, 1172-73, 1234.

The purpose of juror number 4's interactions with Moen's family, and potentially his treating hospital, was to determine if her facility would provide assisted living to Moen. RP 316-19. The extent of Moen's gunshot injury, his potential dementia, his ability to concentrate, plan, and cope emotionally, all of these topics could and likely would have been discussed during a conversation regarding whether or not Moen could care for himself, and whether a particular type of living assistance would be

appropriate. Such information would have compromised Juror number 4's ability to form an opinion on Moen's mental health based solely on evidence introduced at trial. The nature of the conversation, regardless of, or even because of, her inability to recall it, created a serious risk that outside information would bias her decision-making.

For the reasons discussed above, the record supports that juror number 4 failed to disclose material information and exhibited implicit and actual bias warranting removal for cause. The trial court erred in denying Moen's motion for removal. Cho, 108 Wn. App. at 321.

Washington case law supports this conclusion. The Court of Appeals addressed a similar jury issue in Cho, 108 Wn. App. 315. There, a retired police officer failed to disclose his prior employment during *voir dire* despite questioning designed to elicit such a response. Id. at 318, 327-28.

The judge encouraged the venire panel to be open and not withhold any information. Id. at 318. In response to general questions, juror number 8 gave his current occupation as a security guard but failed to disclose his prior occupation as a police officer. Id. at 318-19. The trial court had intended to ask about prior police employment, but in fact, asked only about current law enforcement employment or prior military police employment. Id. at 327. The juror also failed to respond to questions regarding whether

he or a close friend had a particularly favorable experience with police. Id. In response to the question whether he, friends, or family had particularly unfavorable experiences with police, juror number 8 described getting a speeding ticket. Id. at 328.

Juror number 8's prior employment as a police officer was relevant to the issues presented at trial. The State's trial evidence included one police officer who testified regarding his investigation of the incident, and two police officers who testified to impeach defense alibi witnesses. Id. at 319. After the trial, juror number 8 approached defense counsel. Id. During the conversation trial counsel realized juror number 8 had been a police officer for many years, but had not disclosed it during *voir dire*. Id. at 319-20. Juror number 8 also told counsel that he was surprised he had not been asked about his prior police work or been excused from the jury as he had in the past. Id. at 320. He also stated he had argued with several jurors who were not inclined to convict Cho, and "managed to change their minds." Id. at 320. Cho's subsequent motion for a new trial was denied. Id. at 320.

On appeal, the Cho Court concluded that although juror number 8's responses were "not untruthful," and jurors have no obligation to volunteer information not asked of them, "the transcript considered as a whole does raise a troubling inference of deliberate concealment." Id. at 327. The Court found "an inference arises that juror number eight wanted to serve on

the jury and realized that his chances of doing so would be greatly reduced if he disclosed that he had formerly been a police officer. If this was his thinking, he 'was hostile to what he correctly perceived to be the interests of the defense and the court. This in itself constitutes bias.'" Id. at 326 (quoting U.S. v. Scott, 854 F.2d 697, 699 (5th Cir.1988); citing Dyer v. Calderon, 151 F.3d 970, 982 (9th Cir.1998)).

The Cho Court concluded although it was "possible" the juror believed no one would be interested in his prior police employment, "[i]t is more likely that he knew disclosure was the appropriate response to the court's questions, yet deliberately construed them as narrowly and subjectively as possible so as to avoid having to reveal that he was a former police officer." Id. at 328. If so, "his bias is conclusively presumed" and his misconduct violated the defendant's right to a fair trial. Id.

Noting that the trial court had not been briefed on or considered the issue of "implied bias" below, the Court of Appeals remanded for an evidentiary hearing to develop the record. Id. at 329.

The Court offered the following instruction to the trial court. "If the record supports a finding that juror number eight concealed his past employment as a police officer in order to be seated on the jury, the presumption of bias would not be changed by the juror's later protestations of impartiality, however sincere." Id. at 329 (citing Scott, 854 F.2d at 700).

"Doubts regarding bias must be resolved against the juror." Id. at 330 (citing Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir.1991)).

Just as in Cho, the juror here did not admit to deliberately concealing information. The juror in Cho correctly pointed out he was not directly asked about his prior employment. Cho, 108 Wn. App. at 320. Here, juror number 4 asserted she did not recall the information until hearing testimony. RP 317. However, once she did recall it, the transcript taken as a whole gives rise to the inference that she deliberately minimized the nature of her prior interactions in order to remain seated on the jury. See RP 316-19. Like the juror in Cho, juror number 4's efforts to avoid removal despite potentially biasing pre-trial interactions exhibited a hostility to the interests of the defendant and the court, which "'in itself constitutes bias.'" Cho, 108 Wn. App. at 326 (quoting Scott, 854 F.2d at 699). Any remaining "[d]oubts regarding bias must be resolved against the juror." Id. at 330 (citing Burton, 948 F.2d at 1158). The trial court erred in denying Moen's motion to excuse juror number 4 for cause.

The Court of Appeals again considered the issue of juror non-disclosure in State v. Perez, 166 Wn. App. 55, 269 P.3d 372 (2012). In Perez, during *voir dire* a juror failed to disclose that he knew the defendant and his family. Id. at 64. On the second day of trial, the court learned from the bailiff that the juror had advised he might be acquainted with the

defendant's father but was not yet sure if it was the same family. Id. at 63. However, the court did not pass this information on to the parties. Id.

After a trial that resulted in conviction, the defendant learned the juror knew the defendant and his family and moved for a new trial. Id. at 64. The juror was called back for a hearing and testified he did not realize he knew the defendant or his family until the trial began, he heard the defendant's first name, and he saw the defendant's mother sitting in the courtroom. Id. at 64. He had not recognized the defendant because it had been 20 years or more since he had last seen him. Id. at 64. The juror then consulted with his wife that evening, and told the bailiff the next morning. Id. at 64. During the hearing, the juror also acknowledged that he had read a criminal police report involving the defendant, but it was "a long time ago" and he did not recall the details. Id. at 64.

After making detailed findings of fact, the trial court concluded "the information that the juror possessed, scanty as it was, did not influence the juror in any way that would justify a new trial." Id. at 66-67. The Court of Appeals upheld the result, noting bias could not "be fairly inferred from this record." Id. at 68.

Perez is distinct from Moen's case in several key respects: (i) the Perez juror's information was immaterial to the issues at trial, (ii) much of the information was old to the point of irrelevance, and (iii) the trial court

specifically found the juror was forthright and not attempting to "color his responses." Id. at 66.

In Perez, the juror's information was not relevant to the charges or disputed issues at trial. There, the defendant was charged and convicted of driving with a suspended license and attempting to elude. Id. at 58-59. At trial, the jury heard an officer's testimony and watched the police officer's video. Id. at 59. The evidence showed the officer attempted to pull Perez over. Id. at 58. Perez increased his speed, ran a stop sign, exited the vehicle, and fled on foot before being arrested. Id. at 58-59. The defense contested the sufficiency of evidence and argued Perez was not aware the officer was signaling for him to stop. Id. at 59. There is no indication Perez's family members appeared as witnesses; their credibility and the juror's interactions with them had no bearing on the issues presented at trial. In addition, the trial court found the jurors' interaction with the defendant's family members were "very infrequently" as acquaintances, "never individually socializing," and never involved discussion of the defendant. Id. at 66.

This is in stark contrast to juror number 4, whose conversations directly involved the subject of the defendant, and were potentially with trial witnesses regarding hotly disputed issues at trial. The record shows juror number 4 had at least one individual interaction with Moen's family members; three family members testified at Moen's trial. RP 317-18, 333-

53 (step-son, Bradley Miller), 353-62 (grandson, Jody Martin), 1139-85 (daughter, Shelly Moen). As discussed above, Shelly Moen's credibility in particular was at issue, and bore on the critical issue of whether Moen had exhibited signs of dementia. RP 1185, 1310. In addition, the sole purpose of the juror's conversation with family members was to discuss Moen's need for assisted living; Moen's diminished capacity, including his mental and physical capabilities, was the primary issue disputed at trial. RP 316-19, 1513-14.

In Perez, much of the information the juror had learned about the defendant appeared to be old to the point of irrelevance. The trial court found the juror may or may not have been the defendant's Sunday school teacher at some point in the "ancient" past, had passing interactions with Perez's parents but had not seen Perez in "20–plus years," was not aware of any "rumors" Perez was a "black sheep" or was "misbehaving," and had read an unrelated police report "a long time ago," but did not recall further details and was unaware of facts related to the charged crime prior to trial. Id. at 66, 68. As a result, there was no indication in the record that the juror had knowledge of any facts relevant to the case prior the start of trial, and he stated, credibly, "I can't really say that I know very much about the actions of [the defendant] at all." Id. at 68.

In contrast, juror number 4's interactions with Moen's family had occurred within the past year-and-a-half, sometime between his self-inflicted gunshot wound suffered November 10, 2014 and his trial that began August 23, 2016. RP 21, 284-86. As discussed above, the conversation had direct bearing on key issues at trial.

In Perez, because the trial was over, the juror was able to say with certainty, and in the past tense, that he had set this prior knowledge aside when considering the case and relied only on the evidence at trial. Id. at 66-67. Moreover, with the trial done, there was no risk the juror might remember additional information as more evidence was presented. The trial court specifically found the juror credible, describing him as "extremely forthright, very straightforward and under no pressure to color his responses." Id. at 66.

In contrast, the record shows that juror number 4 presented a substantial risk of bias. She did attempt to "color" her responses by minimizing her interactions, was likely to recall additional details as the trial went on, and was likely unable to set aside information learned outside of the trial, despite her "later protestations of impartiality." Id. at 66; Cho, 108 Wn. App. at 329.

The record here shows that juror number 4's bias is more akin to that in Cho than Perez, in that the information she had learned was material

to the case and supported a strong inference of actual and implied bias, warranting excusal for cause. However, the trial court was well aware that the prior removal of jurors 3 and 8 left the jury with no alternates. RP 259. Had juror number 4 been excused, a mistrial would likely have resulted, requiring a repeat of *voir dire* and half a day of trial testimony, as well as rescheduling a long list of State and defense witnesses. Although this admittedly put the court and parties in a frustrating position, a juror's right to a fair and impartial jury cannot be dispensed of on the basis of expedience.

Where a juror should have been dismissed for cause but ultimately decides the defendant's guilt, reversal is required. Gonzales, 111 Wn. App. at 282; see also U.S. v. Martinez-Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (seating a juror who should have been dismissed for cause requires reversal); Fire, 145 Wn.2d at 158 (same).

Here, despite her bias, juror number 4 remained on the jury that ultimately found Moen guilty. RP 321, 1538-39. Additionally, unlike the defendant in Cho who discovered evidence of bias only after trial, here, counsel objected and the record was fully developed, meaning remand for an evidentiary hearing is unnecessary. Compare Cho, 108 Wn. App. at 329; with RP 316-20. Reversal of Moen's conviction is required. Gonzales, 111 Wn. App. at 282.

2. MOEN'S WAS DENIED HIS CONSTITUTIONAL RIGHT AGAINST CRUEL PUNISHMENT WHERE THE TRIAL COURT SENTENCED HIM TO LIFE IN PRISON WITHOUT THE POSSIBILITY OF RELEASE WITHOUT CONSIDERING EVIDENCE OF HIS AGE-RELATED MENTAL INFIRMITY.

Where the State did not seek the death penalty, RCW 10.95.030 required imposition of a life sentence without the possibility of parole, and removed from the sentencing court any discretion to consider mitigating circumstances warranting a reduced sentence. As applied to Moen, an elderly man suffering from age-related mental infirmities, this statute violates the Washington and federal constitutional prohibitions on cruel punishment.

The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishment." U.S. Const., Amend. VIII; also U.S. Const., Amend XIV (making Amend. VIII applicable to states). Article I, section 14 of the Washington Constitution prohibits "cruel punishment." Wash. Const., Art. I, §14.

The Washington Supreme Court "has held that the state constitutional proscription against cruel punishment affords greater protection than its federal counterpart." State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996) (citing State v. Fain, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980)); see also State v. Bassett, 198 Wn. App. 714, 742, 394 P.3d 430 (2017) (recognizing same); but see State v. Dodd, 120 Wn.2d 1,

20-21, 838 P.2d 86 (1992) (holding Art. I, §14 provides no greater protection in narrow context of defendant's waiver of appellate review of death sentence).[2]

Although Art. I, §14 is more protective, Washington Courts have borrowed from federal jurisprudence to establish frameworks to evaluate the State and federal prohibitions of "cruel" punishments. Bassett, 198 Wn. App. at 733 (citing Fain, 94 Wn.2d at 397; State v. Smith, 93 Wn.2d 329, 339-40, 610 P.2d 869 (1980)). Prohibitions fall into two broad types: proportionality and categorical bar. Bassett, 198 Wn. App. at 732.

The "proportionality" approach prohibits sentences that are disproportionately severe when compared to the crime. For example, in Fain, the Court vacated a defendant's life sentence imposed under Washington's three strikes law, despite recognizing he retained the possibility of parole, because it was disproportionate to his crimes: three thefts of less than $470 over 17 years. Fain, 94 Wn.2d at 401-02.

The "categorical bar" approach consists of a line of cases barring certain types of sentences, based either on the class of crime or the class of

[2] The Manussier Court found "an independent analysis" under both the federal and State constitution was "appropriate" and proceeded without an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), which suggests a Gunwall analysis is no longer necessary. Manussier, 129 Wn.2d at 674, 674 n.89 (citing Fain, 94 Wn.2d at 392-93 (additional citations omitted)), 679 (applying Gunwall to defendant's other constitutional claims under Art. I, §3).

offender. Bassett, 198 Wn. App. at 732. This approach is appropriate where the defendant's claim "implicates a sentencing practice as it applies to an entire class" of offenders. Bassett, 198 Wn. App. at 734. Unlike arguments based on proportionality, under the categorical bar approach "'a threshold comparison between the severity of the penalty and the gravity of the crime does not advance' [the Court's] analysis." Id. (quoting Graham v. Florida, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).

Using this latter approach, the U.S. Supreme Court and Washington courts have recognized four broad categories of protected classes of offenders and sentences: persons with intellectual disabilities, juveniles, death penalty sentencing, and sentences to life in prison without the possibility of release. An examination of this case law shows that elderly persons with age-related mental infirmities are a class of offender similarly situated to juveniles and persons with intellectual disabilities. This Court should hold that Art. I, §14 and the Eighth Amendment prohibit the imposition of life in prison without the possibility of release on elderly persons with age-related mental infirmities. In the alternative, at a minimum, courts must consider age and mental-health related mitigating circumstances before imposing life without parole on individuals who potentially belong to this class.

In 2002, the U.S. Supreme Court held execution of the "mentally retarded," i.e. persons with intellectual disabilities, violated the Eighth Amendment. Atkins v. Virginia, 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). The Court noted its decision was based on an understanding of the Eighth Amendment as informed by "'evolving standards of decency.'" Id. (quoting Ford v. Wainwright, 477 U.S. 399, 405, 160 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)).

The Court recognized that although defendants with intellectual disabilities may understand right from wrong and be found competent to stand trial, their "cognitive and behavioral impairments" make them "less morally culpable." Id. at 320. Their deficiencies include "not only subaverage intellectual functioning, but also significant limitations in adaptive skills, such as communication, self-care, and self-direction" as well as "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Id. at 318 (emphasis added).

"With respect to retribution—the interest in seeing that the offender gets his 'just desserts'—the severity of the appropriate punishment necessarily depends on the culpability of the offender" and so would not be served by executing those with reduced culpability. Id. at 319. Similarly,

the goal of deterrence would not be served in executing persons who have "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses." Id. at 320.

The Court also noted such persons "face a special risk of wrongful execution" due to their likelihood of giving a false confession, their reduced ability to participate meaningfully in their own defense or make a showing of mitigating factors, and the fact that they "are typically poor witnesses" whose "demeanor may create an unwarranted impression of lack of remorse for their crimes." Id. at 320-21.

Elderly persons with age-related mental infirmities share many attributes in common with persons with intellectual disabilities, and should similarly be recognized as a vulnerable class of offenders warranting protection under the Eighth Amendment and Art. I, §14. Like persons with intellectual disabilities, dementia patients display a variety of symptoms, including difficulty thinking or organizing thoughts, diminished learning ability, inability to regulate impulses and emotions, and inability to understand and predict the responses of others. Atkins, 536 U.S. at 318; RP 818, 1348-55.

In particular, the concerns raised by the Atkins Court were at issue in this case. The sentencing court displayed its motivation to secure

retribution with its remark that Moen should "rightfully die in prison, cold and alone." RP 1603-04. The court's reasoning emphasized Moen's apparent lack of remorse, and his inappropriate remarks during allocution. RP 1600-04. Moen's inability to be a good witness, present mitigating information in his own defense, understand the likely reaction to his comments, and demonstrate remorse were all on display during his trial testimony as well as his allocution. RP 1204-73, 1584-99. There were strong indications this was a result of his mental deficiency. RP 800-81, 1308-09, 1340. Although Moen's mental deficiencies may not have risen to the level of a complete defense at law, they reduced his moral culpability making retribution less appropriate, deterrence less effective, and increasing the risk that procedural safeguards would not achieve a just sentence. See Atkins, 536 U.S. at 319-21. This Court should find that under Amend. VIII and Art. I, §14, elderly persons with age-related mental infirmities are a class of offenders similarly situated to persons with intellectual disabilities.

In 2014, the U.S. Supreme Court clarified that the definition of intellectual disability could not be rigidly defined. Hall v. Florida, __ U.S. ____, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014). The Court noted that the medical community defines persons with intellectual disabilities as those who have "significantly subaverage intellectual functioning, deficits in adaptive functioning, ... and onset of these deficits during the

developmental period." Id. at 1994. Florida's law defined intellectual disability to require an I.Q. score of under 70 points before the defendant would be permitted to present any mitigating information regarding his mental functioning at a death penalty sentencing hearing. Id. at 1994.

The Court noted that I.Q. was not dispositive of whether an offender had reduced functioning; "'A person with an IQ score above 70 may have such severe adaptive behavior problems ... the that person's actual functioning is comparable to that of individuals with a lower IQ score.'" Id. at 1995 (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 37 (5th ed. 2013)). The Court concluded that the defendant may or may not have an intellectual disability, but at a minimum, the Eighth Amendment required the State to permit him to present evidence in mitigation at his death penalty sentencing hearing. Id. at 2001.

Hall suggests that defining categories, such as intellectual disability or dementia, is difficult, even for the professional medical community. Id. at 1994. As such, Legislative attempts to define such categories narrowly or rigidly, and to preclude persons potentially belonging to such a class from presenting related mitigating evidence at sentencing, must be rejected as violating prohibitions on cruel punishment. Id. at 2001. It is notable that the broader definition of intellectual disability considered by the Hall Court

shares many traits in common with age-related mental infirmities, such as deficits in adapting behavior and impaired cognitive functioning, that may result in the person functioning at a much lower level than his I.Q. or intelligence might suggest. Id. at 1994-95. This supports concluding that offenders such as Moen, who do or even potentially belong to a vulnerable class of offenders, should not be precluded from presenting related mitigating evidence at sentencing.

In 2005, the U.S. Supreme Court extended the reasoning of Atkins to hold the Eighth Amendment barred imposition of the death penalty on juvenile defendants. Roper v. Simmons, 543 U.S. 551, 568, 125 S. Ct. 1183, 161 L Ed. 2d 1 (2005). In so holding, the Court recognized juveniles (i) are immature, often have an "underdeveloped sense of responsibility," take "impetuous and ill-considered actions and decisions," and engage in "reckless behavior." Id. at 569 (internal quotations omitted). They are also more susceptible to external influence and have an unformed character. Id. at 569-70. Again, the Court recognized that this class of offenders has "diminished culpability" which undermines the deterrent and retribution justifications for the death penalty. Id. at 571-72.

As a class, the very young also have many traits in common with elderly persons suffering from age-related mental infirmities. Both have difficulty regulating impulse control, are poor at estimating risks, and

engage in ill-considered behavior. Id. at 569; RP 818, 1348-55. They also both are susceptible to the influence of others and, particularly in the case of dementia affecting the frontal lobes, may have fluid, rather than firmly established personality and behavioral traits. Roper, 543 U.S. at 569-70; RP 818, 1348-55. Thus, the reasoning of Roper supports the proposition that elderly persons with age-related mental infirmities, like juveniles, have reduced moral culpability and so require the same categorical bar and procedural protections as juveniles under Amend. VIII and Art. I, §14.

In 2010, the U.S. Supreme Court held that a sentence of life in prison without parole could not be imposed on juvenile non-homicide offenders. Graham, 560 U.S. at 74. The Court recognized life sentences without the possibility of release are "'the second most severe penalty permitted by law.'" Id. at 69 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d (1991) (Kennedy, J., opinion)). The Court reasoned life without parole was "especially harsh" when imposed on a juvenile because the individual would serve a greater proportion of his life in prison and such as sentence "'means a denial of hope.'" Graham, 560 U.S. at 69 (quoting Naovarath v. State, 105 Nev. 525, 526, 779 P.2d 944 (1989)), 70. Once again emphasizing the "limited moral culpability" of this class of offenders, the Court reasoned the goals of retribution, deterrence,

incapacitation, and rehabilitation were not served by imposing life in prison without parole on juveniles in non-homicide cases. Id. at 71-74.

Similar to the reasoning of Graham, a life sentence for an elderly person with dementia is "especially harsh" and means "'denial of hope'" where a person has few days remaining, will require more medical care, and ultimately may not understand where he is or why he is there. Graham, U.S. at 69 (quoting Naovarath, 105 Nev. at 526), 70. This Court should hold that Amend. VIII and Art. I, §14 do not permit the imposition of life in prison without the possibility of release on an elderly person with mental infirmity.

In 2012, the U.S. Supreme Court held that sentencing schemes mandating life in prison without the possibility of release are unconstitutional as applied to juveniles, regardless of offense type, because it removes the discretion of the sentencing court to consider "age and age-related characteristics." Miller v. Alabama, 567 U.S. 460, 489, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

As discussed above, the class of elderly offenders suffering from age-related mental infirmities shares many traits in common with juvenile offenders. At a minimum, constitutional protections require consideration of "age and age-related characteristics" before imposing life in prison without the possibility of release on this vulnerable class of offenders. Miller, 567 U.S. at 489.

Recent Washington jurisprudence has strengthened and built upon the protections afforded by federal jurisprudence, and further supports the conclusion that life sentences for elderly persons with age-related mental infirmities are unconstitutional, or at a minimum require consideration of mitigating evidence prior to sentencing.

Just this year, the Washington State Supreme Court held sentencing courts "must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). The Court also concluded the seemingly mandatory language of firearm enhancement statutes did not apply to juveniles. Id. at 24-26; but see State v. Witherspoon, 180 Wn.2d 875, 887-91, 329 P.3d 888 (2014) (holding mandatory life sentencing without possibility of release was not unconstitutional as applied to ordinary adult offender).

The Court also considered the issue of mitigating evidence in the context of intellectual disabilities. In In re Personal Restraint of Davis, the Washington State Supreme Court considered Davis's challenge to his death sentence imposed after conviction for aggravated first degree murder. ___ Wn.2d ___, 395 P.3d 998, 1001 (2017). The Court upheld the sentence, reasoning that although the Washington sentencing statute's definition of

intellectual disability could be interpreted as unconstitutional, despite this statute, the sentencing court had allowed Davis to present to the jury mitigating evidence regarding his intellectual functioning, and it was not clear that Davis in fact had intellectual disabilities. Id. at 1004, 1010.

Taken together, Houston-Scioners and Davis provide strong support for the proposition that sentencing courts must, at a minimum, consider mitigating evidence before sentencing anyone potentially belonging to a vulnerable class of offenders to life in prison without parole.

The Court of Appeals recently held under the categorical bar analysis that a juvenile's sentence of life in prison without possibility of release for a first degree aggravated murder violated Art. I, section 14 of the Washington Constitution. Bassett, 198 Wn. App. at 743 (citing RCW 10.95.030(3)(a)(ii)). The Court of Appeals did not reach the Eighth Amendment issue. Id. at 722.

The Bassett Court noted that prior to Miller, first degree aggravated murder carried a mandatory sentence of life in prison without the possibility of release, regardless of age. Id. at 726 (citing Former RCW 10.95.030 (1993)). Post-Miller, the statute was amended to permit, but not require, juveniles to be sentenced to life in prison without parole, provided the sentencing court must consider the mitigating circumstances associated with the offender's youth. Id. at 726-27 (Current RCW 10.95.030).

The Bassett Court noted that the Washington State Supreme Court has "built upon" and "extended" the principles of Miller's holding to conclude cruel punishment prohibitions (1) bar de facto life sentences for juveniles, even when sentenced for multiple homicides, (2) permit youth-based departures from standard range sentences, and (3) grant sentencing courts discretion to depart to any degree from otherwise mandatory sentencing schemes, on the basis of youth-related characteristics. Bassett, 198 Wn. App. at 736-37 (citing State v. Ramos, 187 Wn.2d 420, 438, 387 P.3d 650 (2017); State v. O'Dell, 183 Wn.2d 680, 690, 358 P.3d 359 (2015); Houston-Scioners, 188 Wn.2d at 22).

In reaching its holding, the Bassett Court reasoned as follows. First, even expert psychologists have difficulty differentiating those juveniles who committed an offense because of youth from those who were irretrievably corrupt. Id. at 742. Second, the current statute, which requires sentencing courts to consider youth-related factors, puts the court in an "impossible position" of attempting to do what expert psychologists cannot. Id. Third, the "court's task is made even more difficult" where Washington's constitutional prohibition against cruel punishment is more protective than its federal counterpart. Id. Fourth, consideration of the Miller-factors is speculative at best, leaving courts without direction regarding whether certain factors reduce or increase the offender's

culpability. Id. at 743. These factors combine to create what the court called an "unacceptable" risk that juvenile offenders would be sentenced to life in prison without the possibility of release, in violation of Art. I, §14. Id. Thus, a categorical bar on such sentences was appropriate. Id.

Under the reasoning in Bassett, life sentences without the possibility of release should be categorically barred for elderly offenders, such as Moen, suffering from the mental infirmities of advanced age. At a minimum, Art. I, §14 requires meaningful consideration of the mitigating circumstances of advanced age before a life sentence without the possibility release is imposed.

When determining if a particular sentencing practice is constitutionally prohibited, the categorical bar approach requires a two-step analysis involving (1) "both the review of objective indicia of societal standards expressed through legislative enactments and state practice to determine whether there is a national consensus" as well as (2) "the exercise of independent judgment." Id. at 732 (citing State v. Schmeling, 191 Wn. App. 795, 799-800, 365 P.3d 202 (2015) (quoting Graham, 560 U.S. at 61).

The first prong of the categorical bar suggests an emerging consensus, both nationally and in Washington, that an offender's advanced age and related mental incapacity must be considered as mitigating factors at sentencing.

In recognition of the "silver tsunami" of the aging population and its interaction with the justice system, some states are creating special elder courts and other access to justice initiatives to address offenses against or by elderly individuals driven by the mental decline associated with advanced age. Human Rights Watch, Old Behind Bars: The Aging Prison Population in the United States, 12 (2012) (documenting "silver tsunami" of older offenders in U.S. prisons); see e.g. New York State Judicial Committee on Elder Justice (website: https://www.nycourts.gov/courts/family-violence/eji.shtml); Contra Costa County (California) Elder Court (website: http://www.courts.ca.gov/14124.htm).

In addition, several states from across the nation allow for sentence mitigation on the basis of a mental ailment that affects a defendant's culpability. E.g. California Rules of Court 4.423(b)(2) (California permitting mitigation where "defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime"); Oregon Administrative Rules 213–008–0002 (Oregon permitting mitigation where "defendant's mental capacity was diminished"); People v. O'Neill, 86 A.D.2d 213, 215, 449 N.Y.S.2d 515 (1982) (New York statute allowing for mitigation was generally "intended by the Legislature to include facts which would tend to diminish the defendant's culpability and alleviate his guilt"); Middleton v. State, ___So.3d ____, 2017 WL 930925

(2017) (Florida recognizing "mitigating factor of substantial impairment" in sentencing).

Washington law similarly permits most defendants to present evidence of mitigation based on mental deficiencies. Sentencing courts are authorized to depart from sentencing guidelines where mitigating factors are found by a preponderance of the evidence. RCW 9.94A.535(1). Included in the non-exclusive list is "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e). Washington law also requires the trier of fact to consider mitigating evidence before sentencing a person to death after conviction for first degree aggravated murder. RCW 10.95.030(2). Death penalty sentencing law explicitly discusses consideration of age and mental capacity as factors meriting lenience. RCW 10.95.070(2), (6), (7).

Thus, had Moen either been convicted of a less serious crime or faced a more serious penalty, he would have been entitled to consideration of mitigating evidence. It is only the anomalous sliver of offenders in between—those convicted of aggravated first degree murder who do not face a potential death sentence—who have no such opportunity. The backdrop of Washington sentencing law, and the outlier of non-death penalty aggravated first degree murder sentencing, strongly suggests that

Washingtonians expect that mitigating evidence of age-related mental infirmity can and should be presented at sentencing.

Taken together, these laws and programs suggests an emergent norm, in Washington and nation-wide, to recognize the special needs of the elderly population and the reduced culpability of elder offenders suffering from age-related mental infirmities, even where the infirmity may not rise to the level of a complete defense at law.

The second prong of the analysis is a Washington court's exercise of independent judgment to determine if a categorical bar on a particular sentencing type is appropriate.

As discussed above, elderly persons with age-related mental infirmities share traits with juveniles and persons with intellectual disabilities that reduce their moral culpability and make retribution inappropriate. They have cognitive impairments that limit their ability to make decisions, control impulses, or accurately predict the risk level of their behaviors. RP 818, 1348-55. This class of offenders, like juveniles, also has particularized traits that make life sentencing especially harsh; they have increased medical needs, fewer years remaining, and may ultimately not even recall where they are or why they are there, making it far more likely they will "die in prison, cold and alone." RP 1603-04. Finally, this class of offenders shares traits with both protected classes that reduces the

effectiveness of procedural safeguards, including inappropriate behavior, the inability to be a good witness, assist in one's own defense or present mitigation, and the inability to predict the reactions of others, appropriately understand one's own actions, or express remorse. RP 818, 1348-55.

For all of these reasons, this Court should exercise its independent judgment to conclude that life sentencing of elderly persons with mental infirmities presents an "unacceptable" risk of unjust sentencing, and should be categorically barred under the Eighth Amendment and Art. I, §14. Bassett, 198 Wn. App. at 743. Moen's sentence must be vacated.

D. CONCLUSION

Moen's right to a fair trial by impartial jury was violated when juror number 4 was permitted to remain and determine his guilt. His right against cruel punishment was violated when the sentencing court imposed a life sentence without the possibility of release, and refused to consider mitigating evidence related to his mental infirmities.

Moen respectfully asks that this Court reverse his conviction and remand for a new trial under Amend. VI and Art. I, §22, or vacate his sentence and remand for resentencing under Amend. VIII and Art. I, §14.

DATED this 28th day of July, 2017.

Respectfully submitted,

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